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Supreme Court, U. S.
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No.

In the

Supreme Court of the United States

October Term, 1978

ZED DANIELS,

Petitioner,

vs.

RICHARD L. KIESER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Zed Daniels respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in these proceedings on November 7, 1978.

Opinions Below

The opinion rendered by the United States District Court for the Northern District of Illinois, which is reported at 446 F.Supp. 1160 (N.D. Ill. 1978), is contained in the Appendix hereto. *Appendix* 1-6. The opinion of the Court of Appeals, which is reported at 586 F.2d 64 (7th Cir. 1978) also appears in the Appendix. Appendix 7-16.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 7, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to Section 1254(1) of Title 28, United States Code.

Question Presented

Whether the doctrine of prosecutorial immunity as set forth in *Imbler* v. *Pachtman,* shields a federal prosecutor from civil liability to a government witness whom the prosecutor has caused to be arrested and jailed on a material witness warrant procured by the prosecutor who knowingly lied to a federal district court judge and intentionally withheld material information of which he had personal knowledge, in violation of the witness's Fourth and Fifth Amendment rights and 18 U.S.C. § 3149.

Constitutional And Statutory Provisions Involved

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 18:

§ 3149. Release of material witnesses

> If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Petitioner Zed Daniels, a Chicago businessman and victim of a crime, was arrested and jailed in Chicago on November 9, 1976 by federal marshals for failing to respond to a subpoena that was never served on him. The material witness arrest warrant for Daniels' arrest was procured by respondent Richard L. Kieser, Assistant United States Attorney for the Northern District of Indiana. Daniels subsequently sued Kieser in the District Court for the Northern District of Illinois for violation of Daniels' constitutional and common law rights. Federal jurisdiction is based on questions of federal constitutional law and actions of a federal officer purporting to act under color of a federal statute, 18 U.S.C. Section 3149, and diversity of citizenship.

Kieser moved to dismiss Daniels' complaint, claiming absolute prosecutorial immunity from civil liability.[1] That motion was denied by the Honorable Hubert L. Will who, pursuant to Kieser's request, certified the following question for interlocutory appeal to the United States Court of Appeals for the Seventh Circuit:

> "Whether a prosecutor is absolutely immune from a suit for damages brought by a prospective government witness in a criminal trial whom the prosecutor has caused to be

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[1] Kieser moved to dismiss the complaint. No answer was ever filed. The factual allegations of the complaint, therefore, are taken as true.

> arrested pursuant to a warrant obtained by false representations to the Court and in violation of Title 18 U.S.C. Section 3149."

The Seventh Circuit reversed, citing *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), and *Butz* v. *Economou,* _____ U.S. ____, 98 S.Ct. 2894 (1978).

The events which led to Daniels, the victim, going to jail are as follows. Daniels' car, stolen in Chicago, was recovered in Indiana. Kieser prosecuted the subsequent Dyer Act action in a bench trial before Judge Robert A. Grant in South Bend. Daniels was subpoenaed (without difficulty) to appear in South Bend on October 15, 1976. Because of a business schedule conflict, and after he engaged lawyers in Chicago and South Bend, Daniels' date to appear was rescheduled to November 4, 1976. Daniels was told he would be subpoenaed to appear on November 4, and in fact, a subpoena for him was issued but never served.

On the afternoon of November 3, 1976, not having been subpoenaed, Daniels left his downtown Chicago office for O'Hare Airport to depart on a previously scheduled charter flight business trip with his wife, business associates and clients. Later that afternoon, Daniels' business associate received a telephone call at Daniels' office from a federal marshal in Chicago who said the marshals had found a subpoena for Daniels which they had failed to serve on him because the marshal who was to have served it had mislaid it and he subsequently went on vacation. The marshal was told that Daniels had departed for O'Hare and was given Daniels' flight number and time of departure, destination, and return flight number, date and time of arrival. That same afternoon, the marshal telephoned Kieser and informed him of the marshals' error in failing to serve Daniels, and Daniels' travel arrangements. Kieser, the marshal, Daniels' business associate, and Daniels' attorney discussed the failure to serve Daniels in

several telephone calls back and forth on the afternoon of November 3, 1976. Daniels was not served at O'Hare, nor was there any indication that any attempt was made to serve him there, at his office, or at his home or elsewhere on or before November 3 for the November 4, 1976 court appearance.

On the morning of November 4, 1976, Kieser went before Judge Robert A. Grant in South Bend, advised the judge that the trial could not proceed because the defendant had not appeared for trial, and then made the following statements which he knew to be false: the government's witness, Zed Daniels, very clearly appeared to be attempting to escape service of the subpoena on him; Daniels had previously left town after being notified of a subpoena and was doing so again; Daniels' attorney had assured him two days earlier that Daniels would be there, but that Daniels had doublecrossed his attorney; and Kieser had absolutely no idea of when Daniels would return. Kieser then asked Judge Grant for a material witness warrant for the arrest of Daniels and a $10,000 bond which the court granted on the basis of these misrepresentations. (November 4, 1976 Transcript, Exhibit 1 to Complaint.)

Kieser's statements to Judge Grant were completely contrary to his personal knowledge, based on the events of the preceding afternoon. Kieser intentionally failed to inform Judge Grant that Daniels had not been subpoenaed and that he apparently had no knowledge of the subpoena. He also failed to inform the Judge of the error in the U.S. Marshal's office; the fact that he had detailed knowledge of Daniels' travel itinerary; and that Daniels' associate had fully cooperated with the marshal's office as soon as the existence of the subpoena became known. Moreover, the federal statute authorizing material witness warrants, 18 U.S.C. § 3149, requires that a prosecutor seeking a material witness arrest warrant file a sworn affidavit to support his request for the warrant. Kieser's

misrepresentations regarding Daniels were not under oath, nor did he file an affidavit, in violation of 18 U.S.C. Section 3149. (November 4, 1976 Transcript, Exhibit 1 to Complaint.)

Federal marshals met Daniels' scheduled return flight on November 9, 1976. They boarded the aircraft, arrested Daniels and escorted him off the aircraft at O'Hare Airport in front of his wife, business associates and clients. He was interrogated at the airport and then jailed at the Chicago Metropolitan Correctional Center. At the jail he was strip-searched, physically examined, fingerprinted, photographed, his clothes and possessions were taken from him, and he was locked up in a maximum security cell. Through the efforts of his attorneys, Daniels was released on November 10, 1976 after a hearing before a United States Magistrate.

Daniels later testified in South Bend in the Dyer Act bench trial. He subsequently filed this suit charging violations of his constitutional rights, false imprisonment, malicious prosecution and abuse of process by Kieser.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Decide Whether The Policy Of Prosecutorial Immunity Set Forth In *Imbler* V. *Pachtman* And *Butz* V. *Economou* Does, In Fact, Permit A Federal Prosecutor To Intentionally Lie To A District Court Judge For The Purpose Of Obtaining An Arrest Warrant For A Trial Witness.

The posture of this case is such that it is deemed admitted that respondent Kieser, an Assistant United States Attorney, withheld material facts and lied to a federal judge, intentionally misleading him for the purpose of procuring an arrest warrant for Daniels, in violation of Daniels' Fourth and Fifth Amend-

ment rights and 18 U.S.C. § 3149. Notwithstanding these facts, the Court of Appeals for the Seventh Circuit held that the policy of prosecutorial immunity expressed in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) and *Butz* v. *Economou*, ____ U.S. ____, 98 S.Ct. 2894 (1978), compelled it to dismiss the complaint against the respondent prosecutor.

The policy of prosecutorial immunity is not a constitutional doctrine. Rather, it reflects a policy decision in derogation of constitutional rights and, as such, should be limited to the extent possible consistent with effectuating the underlying policy. In deciding *Imbler*, this Court did not contemplate that the policy of prosecutorial immunity expressed therein would extend to all acts of the prosecutor, or that its decision would resolve all issues concerning prosecutorial immunity. Rather this Court explained:

> We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting to the State's case, the prosecutor is immune from a civil suit for damages under § 1983. (footnotes omitted).

Imbler, 424 U.S. at 430-31.

The facts of the instant case stand in stark contrast to those of *Imbler* and present important issues left unresolved by *Imbler*. Those issues include the following.

A. Does *Imbler* Extend To A Prosecutor's Intentional, Wrongful Acts Which Do Not Involve The Prosecutorial Discretion This Court Has Sought To Protect?

Imbler recognized that in the course of performing his prosecutorial duties, a prosecutor must be free to use his discretion without fear of being required to answer later to disgruntled criminal defendants on the basis of post facto judgments as to decisions to prosecute or not, credibility of witnesses, presentation of evidence and arguments, and similar determinations. The type of discretionary decisions that a prosecutor is required to make on a day-to-day basis require judgment involving facts, the truth or falsity of which the prosecutor has no way of determining with an absolute degree of certainty, and encompasses other areas in which subjective judgment is an important factor. *Imbler* recognized that in such instances it would be detrimental to the prosecutorial function to permit a prosecutor to be exposed to potential personal liability for carrying out his necessary discretionary functions.

It cannot be seriously contended that the decision to lie to a federal judge involves that form of discretion which this Court seeks to protect. The respondent Assistant United States Attorney knew that he was lying to the federal judge. He knew that he was misleading the court by withholding material facts and he fully intended to do so. There was no question regarding the veracity of witnesses or validity of evidence; no subjective judgment was involved. The prosecutor knew that what he was doing was wrong; that the statements he was making to the court were false; and that he was withholding facts which were both true and material. Kieser knew this to be a violation of his oath of office and the code of ethics and he did it anyway. The case at bar does not involve the possibility of an innocent mistake or error in judgment which this Court sought to protect in *Imbler*.

B. Should The Policy Of Prosecutorial Immunity Apply When Its Underlying Considerations Are Inapplicable?

Imbler involved an incident in which the defendant in a criminal prosecution was suing the prosecutor. This Court expressly focused on the possibility of angered defendants initiating suits against prosecutors:

> The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.

Imbler, 424 U.S. at 424-25.

This Court expressed four public policy concerns in its *Imbler* opinion: first, a prosecutor might be constrained in deciding which suits to prosecute and in conducting them if he had to consider his own potential liability as the result of retaliatory suits filed by criminal defendants, *id.*; second, a prosecutor's energy and attention would be diverted by defending against such suits, *id.* at 425; third, that prosecutorial misconduct at trial would involve virtual retrial of a criminal case in a subsequent civil case and could result in harm to a defendant's case on appeal if the appellate judges thought reversal for error might subject the participants at trial to civil liability, *id.* at 425-27; and fourth, that relevant evidence might be lost if prosecutors were hampered in exercising their judgment as to the use of a witness because of potential personal liability to criminal defendants for the veracity of the witness, *id.* at 426. None of the policy concerns which, cumulatively, led this Court to its decision in *Imbler* is applicable to the facts of this case.

The instant case does not involve a criminal defendant seeking retaliation. The plaintiff in the case at bar was the

government's witness and the victim of the crime that was the subject matter of the prosecution. Unlike disgruntled defendants, government witnesses and crime victims are not a class prone to bring retaliatory litigation against prosecutors, or from whom prosecutors need fear vexatious litigation which might impede their duties. It is noteworthy that virtually every prosecutorial immunity suit has been brought by the accused party, including *Imbler* and *Butz*.

In reaching its decision in *Imbler*, this Court balanced the rights of the individual to seek redress for a violation of his constitutional rights against the need for prosecutors to be reasonably free from fear of retaliatory or vexatious litigation by criminal defendants. In the case at bar, the motivation which underlies such vexatious suits is entirely absent.

II.

This Court Should Resolve The Important Federal Question Of The Appropriate Boundaries Of Prosecutorial Immunity.

Imbler set forth a policy of absolute immunity protecting prosecutors from civil liability to defendants for claims arising out of the exercise of prosecutorial discretion in initiating and conducting a prosecution. Neither *Imbler* nor *Butz* addressed the issue of immunity when an individual other than a defendant brings suit against a prosecutor, as this issue was not before the Court.

This Court noted in *Imbler* that a prosecutor's absolute immunity was not without limits. *Imbler*, 424 U.S. at 430-31. Nowhere did this Court state or imply that the scope of those limits extends to a prosecutor who intentionally lies to a judge, while withholding the true material facts which were personally known to him.

Unlike the judgments which a prosecutor must constantly make in deciding to initiate a prosecution, or what evidence to present or forego, a prosecutor's decision to knowingly lie to a judge and to withhold true facts known to the prosecutor is not among the discretionary functions which *Imbler, Butz* and their predecessors seek to protect. Indeed, such actions are the very antithesis of the truth-seeking process which is the foundation of our judicial system. To immunize a prosecutor who knowingly lies to a trial judge seriously undermines the truth-seeking process which *Imbler* and *Butz* seek to protect, and eliminates the only effective remedy which could deter such wrongdoing—a suit by the person thereby injured. This is especially true where a person other than the defendant is injured, for that person has no other way to deter such wrongdoing. A defendant at least has the opportunity to defend, to question, to challenge, and to respond. In the instant case, Daniels, the victim of the crime, had no opportunity to respond to the prosecutor's false statements and withholding of the true facts. He consequently suffered substantial injury, and unless the decision of the Seventh Circuit is reversed, he will never have an opportunity to respond or clear the stain on his reputation which resulted from his unlawful arrest in the presence of his friends and business associates, and subsequent incarceration. Nor will prosecutors be deterred from such unquestionably wrongful behavior in the future.

The facts of the instant case clearly demonstrate that the court was intentionally misled by the prosecutor. To hold that a prosecutor may blantantly lie to a judge under the guise of protecting the judicial process is a gross perversion of *Imbler*, fully beyond its intended scope. This result invites prosecutors to adopt a lower degree of candor and professional ethics with the courts than that required of other members of the bar. Extending absolute immunity to the facts presented in this case can only erode public confidence in the prosecutor's office.

Due to the questions which this Court has left unresolved in both *Imbler* and *Butz*, the present state of the law is unclear. Flagrant misconduct such as that exhibited by Kieser in the case at bar will continue unless this Court more clearly delineates the appropriate bounds of prosecutorial immunity.

The instant case provides this Court with a unique and appropriate opportunity to clearly define these limits: first, to indicate that there are limits governing a prosecutor's activities regardless of whether the prosecutor is acting in an investigative, administrative or adjudicative role; second, to put prosecutors on notice that a prosecutor may not knowingly lie to a judge and withhold true facts then known to him; and third, to provide potential litigants against prosecutors with clearer guidelines on the scope of prosecutorial immunity. Surely qualified immunity in areas not encompassed by absolute immunity would provide more than adequate protection for a prosecutor who, like Kieser, so blantantly disregards his duties as an officer of the court. This Court has consistently held that qualified immunity provides sufficient protection for many high level officials. *See, e.g., Butz* v. *Economou,* ____ U.S. ____, 98 S.Ct. 2894 (1978) (certain federal executive officials); *Procunier* v. *Navarette,* ____ U.S. ____, 98 S.Ct. 855 (1978) (prison administrators); *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975) (state hospital superintendent); *Wood* v. *Strickland,* 420 U.S. 308 (1975) (school administrators); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) (state executive officials).

The decision of the Court of Appeals, which grants prosecutors absolute immunity from liability for intentionally misleading a federal court and depriving a government witness of his constitutional rights, subverts rather than furthers the policies sought to be achieved by this Court in *Imbler.* Those policies can best be effected by further defining the limits of absolute prosecutorial immunity against the background of the instant case. For these reasons, a writ of certiorari should be issued to review the judgment of the Court of Appeals.

CONCLUSION

For all of the reasons stated herein, petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ZED DANIELS,
Plaintiff,
v.
RICHARD L. KIESER,
Defendant.

No. 77 C 3409

MEMORANDUM OPINION

This is an action for false arrest and imprisonment brought by plaintiff, a witness in a federal criminal trial in the United States District Court for the Northern District of Indiana, against an Assistant United States Attorney of that district. Plaintiff alleges that his arrest and imprisonment came as a result of defendant's "knowingly false and malicious statements" made to United States District Judge Robert Grant which resulted in the issuance of a material witness arrest warrant by Judge Grant. Defendant, through the United States Attorney of this District, has moved to dismiss on the ground of prosecutorial immunity. For the reasons herein stated, we deny the motion to dismiss at this time.

I.

The facts, as alleged by plaintiff, indicate that plaintiff, a citizen of Illinois, was to be a prosecution witness in a Dyer Act case. Defendant was the Assistant United States Attorney assigned as the prosecutor in the case. Plaintiff had been advised that the case had been continued to November 4, 1976, and that he would be subpoenaed. On November 3, 1976,

plaintiff, who had not yet received any subpoena, left his office to depart on a long-scheduled business trip with his wife and certain business associates and clients. Later that afternoon, a Deputy United States Marshal in Chicago telephoned plaintiff's office to advise that a subpoena was supposed to have been served on plaintiff, but had not been because it had been misplaced in the office of the United States Marshal in Chicago. The marshal was advised that plaintiff was already en route to O'Hare Airport and was given the details of plaintiff's trip, including departure and return times. Plaintiff was not served on November 3, 1976, and no effort was apparently made to contact him at the airport or on his trip.

The marshal telephoned the defendant in South Bend that afternoon and explained that the failure to serve plaintiff was due to an error in the United States Marshal's office in Chicago. Plaintiff alleges, however, that defendant refused to accept the explanation.

On Thursday, November 4, 1976, neither plaintiff nor the defendant in the criminal case were present in court in South Bend. Plaintiff alleges that Kieser then made the following false statements to Judge Robert Grant: "that Mr. Daniels was evading service of the subpoena; that he had previously done so; that he had left town after being notified by the United States Marshal's Office of the subpoena; that Mr. Daniels' attorney in Chicago, a Mr. Thomas Shanahan, had told Mr. Kieser on Tuesday, November 2, 1976, Mr. Daniels would be in South Bend, and on Wednesday, that Mr. Daniels had 'doublecrossed' him; and that Mr. Kieser had no idea of when Mr. Daniels would return."

Judge Grant, without requiring a formal affidavit or sworn testimony, then ordered a material witness warrant for Mr. Daniels to issue and set bond at $10,000.00 as Mr. Kieser requested. Plaintiff alleges that the warrant was invalid since it was not supported by sworn testimony as required by 18 U.S.C. § 3149.

On November 9, 1976, two Deputy United States Marshals met plaintiff's return flight at O'Hare Airport and arrested him in the presence of his companions. Plaintiff was interrogated, handcuffed, taken from the airport to the federal lockup where he was fingerprinted, photographed, disrobed, searched, subjected to a complete body search and physically examined. Plaintiff was then imprisoned in the maximum security section.

At a hearing on November 10, 1976, before United States Magistrate James T. Balog, plaintiff was released.

Plaintiff brings this action under federal law and under Illinois state law pursuant to diversity jurisdiction. Defendant has moved to dismiss on the authority of the prosecutorial immunity authorized by *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

II.

Plaintiff's counsel has not attempted to dispute the proposition that *Imbler* is here applicable.[1] Instead, counsel ask us, in twenty-two pages of impassioned rhetoric in which the voices of John Adams, James Otis, William Pitt, John Wilkes, and the NEW YORKER are invoked, to find that *Imbler* v. *Pachtman* was wrongly decided and, in effect, to overrule it. This is obviously beyond our power.

On the other hand, *Imbler* does not purport to grant immunity to prosecutors for everything they may do in conjunction with a case or in the purported exercise of their official authority. The Supreme Court defined the prosecutorial immu-

[1] Although the issue has not been raised by the parties, we find that the *Imbler* standard is applicable to *Bivens*-type suits brought against United States Attorneys. See *Brawer* v. *Horowitz*, 535 F.2d 830, 834 (3d Cir. 1976); see also *Heltoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977); *Ostrer* v. *Aronwald*, 434 F.Supp. 379, 390-92 (S.D. N.Y. 1977).

nity as covering activities "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Specifically, it held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages . . .", 424 U.S. at 431, and left open the question of a prosecutor's possible liability for action taken in an investigative or administrative capacity. We are not at all certain that a request for a bench warrant at a status hearing prior to the commencement of trial is part of the "judicial phase of the criminal process" and we are inclined to believe that it is simply a ministerial act within the prosecutor's administrative functions.[2] Whether the defendant's conduct here falls within the ambit of *Imbler* is not entirely clear and we are, therefore, disposed to deny the preliminary motion to dismiss.

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[2] As the Court noted, 424 U.S. at 431 n. 33:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witness to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

We believe that additional facts are necessary before we can determine whether defendant's conduct was "administrative" or "judicial." We do not think, however, that the mere fact that the motion for a bench warrant was made to a judge inside a courtroom establishes that it was part of the judicial phase.

An equally, if not more, relevant question, however, is whether the absolute immunity of *Imbler* is applicable when the plaintiff is not an allegedly wronged criminal defendant, but is instead a witness, and, in fact, as in the instant situation, a witness for the prosecution. In balancing the policies between a qualified and an absolute immunity, the Court was concerned with the prosecutor's duty

> to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.

We think there are significant differences between the likelihood that an angry defendant will file a nuisance suit and the possibility of one filed by a government witness. While there may be merit in the concern that a prosecutor will be hesitant to bring an action against a defendant for fear of being subject to civil liability, there seems to us to be little ground for believing that a prosecutor will choose his witnesses differently because of the same fear. Nor does the common law origin of prosecutorial immunity, stemming from the question of amenability to suit for malicious prosecution, have any application when the civil plaintiff is a witness rather than a defendant. We find, therefore, that *Imbler* is clearly distinguishable from the case before us and we deny the motion to dismiss.[3]

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[3] Our decision at this stage of the proceedings that the absolute immunity is inapplicable does not, of course, leave Mr. Kieser defenseless, as he still has available to him the good faith defense of the qualified immunity available to public officials. See *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

An appropriate order will enter.

United States District Judge

DATED:

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1648

ZED DANIELS,

Plaintiff-Appellee,

v.

RICHARD L. KIESER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C 3409—**Hubert L. Will**, *Judge.*

HEARD SEPTEMBER 26, 1978—DECIDED NOVEMBER 7, 1978

Before CUMMINGS, WISDOM,* and SPRECHER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Plaintiff is a Chicago businessman whose automobile was stolen in Chicago on June 14, 1976. Blandford Phoenix, another Chicagoan, was arrested in La Porte, Indiana, in possession of the automobile. On October 20, 1976, a bench trial commenced in which the Government attempted to show that Phoenix had violated the Dyer Act (18 U.S.C.

* The Honorable John Minor Wisdom, Senior Circuit Judge of the Fifth Circuit, is sitting by designation.

§§ 2311-2313) by the theft and interstate transportation of plaintiff's automobile.[1]

Plaintiff was served with a subpoena to appear on October 15, 1976, as a witness at Phoenix's trial in South Bend, Indiana. However, through an associate, plaintiff advised federal prosecutor Richard Kieser that he would be unable to appear on that date and on October 13 the trial was reset to October 20, 1976. The bench trial commenced on that date and the Government presented certain evidence but did not conclude its case. The trial was scheduled to resume on November 4, 1976, because plaintiff had secured a continuance until then for his appearance as a government witness. According to the complaint, plaintiff was advised by his South Bend attorney "that the case would proceed on November 4, 1976 and a new subpoena would be served" on him. Since no subpoena was served upon him, plaintiff left Chicago for Bermuda on November 3, 1976, to attend a professional association meeting. After plaintiff left his Chicago office for O'Hare airport to depart for Bermuda, a Deputy United States Marshal in Chicago telephoned plaintiff's office that he had just discovered an unserved November 4, 1976, subpoena for plaintiff's attendance at Phoenix's trial. The Deputy Marshal "explained the subpoena had been misplaced, apparently by another Deputy United States Marshal who had left on vacation without serving it." An associate of plaintiff advised the Deputy United States Marshal about plaintiff's pending departure and provided him with the flight number and date of plaintiff's expected return, which was on November 9, 1976. The Deputy Marshal said he would attempt to explain the matter to defendant and obtain a new trial date, but defendant allegedly refused to seek another continuance and told the Deputy Marshal to have plaintiff in South Bend on November 4 for resumption of the trial.

[1] Eventually Phoenix was found not guilty of this offense by Judge Sharp who succeeded Judge Grant as the trial judge.

On November 4, defendant appeared before Judge Grant in South Bend and told the judge that plaintiff "was attempting to evade service of the subpoena" and persuaded the court to issue a material witness arrest warrant for Daniels under 18 U.S.C. § 3149.[2] According to the complaint, the prosecutor made the following unsworn false statements (or statements in reckless disregard of the truth) in order to obtain Daniels' material witness arrest warrant from Judge Grant:

> "(a) That Mr. Daniels was attempting to evade service of the subpoena;
>
> "(b) That Mr. Daniels had previously attempted to evade service of the subpoena;
>
> "(c) That Mr. Daniels had left town after having been notified by the United States Marshal's office that there was a subpoena for him;
>
> "(d) That Mr. Kieser had been assured on November 3, 1976 by Thomas Shanahan, a lawyer who represented Mr. Daniels, that Mr. Daniels would be in the South Bend courtroom at 1:00 p.m. on November 4, 1976;
>
> "(e) That Mr. Shanahan told Mr. Kieser on November 3, 1976 that Mr. Daniels was 'double-crossing' Mr. Shanahan and not keeping an agreement between Mr. Shanahan and Mr. Kieser;

[2] Kieser obtained the material witness arrest warrant without the affidavit required by Section 3149 which provides as follows:

> "If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."

"(f) And that Mr. Kieser had no idea of when Mr. Daniels would return to the United States;"

On November 4, as the transcript of that date reveals, the Dyer Act defendant Phoenix was not present in court, supposedly because he thought the trial was continued until November 5, so that the trial could not have proceeded on November 4 anyway.

When plaintiff returned to O'Hare airport in Chicago on November 9, he was arrested and taken into custody in the presence of his wife, business associates and clients, and was interrogated, handcuffed and taken to the federal lockup in Chicago upon defendant's directions pursuant to the material witness arrest warrant of November 4. When plaintiff arrived at the lockup, he was fingerprinted, photographed, disrobed, searched, physically examined and imprisoned in the maximum security portion of the Federal Detention Center until a United States Magistrate released him on November 10, 1976. Plaintiff subsequently testified as a government witness when Phoenix's trial resumed in South Bend.

Plaintiff later instituted this suit against prosecutor Kieser. Count I of the complaint alleged a violation of plaintiff's rights under the Fourth and Fifth Amendments and under 18 U.S.C. § 3149. Count II was a false imprisonment count; Count III was for malicious prosecution, and Count IV was for abuse of process. In each count except Count III, plaintiff sought $100,000 in damages plus $50,000 in punitive damages and costs and reasonable attorney's fees.[3]

The Government filed a motion to dismiss on the ground that defendant was an Assistant United States Attorney for the Northern District of Indiana and as a public prosecutor was "absolutely immune from civil acts of the nature set forth in the complaint" (Record Item 3, page 3). The plaintiff insisted that in the circumstances of this case, the prosecutor had only

[3] Punitive damages were not sought in Count III alleging malicious prosecution.

qualified immunity.[4] Judge Will agreed with the plaintiff and filed a memorandum opinion denying defendant's motion to dismiss. *Daniels v. Kieser*, 446 F. Supp. 1160 (N.D. Ill. 1978).

The district court first noted that plaintiff brought the action under federal law and under state law pursuant to diversity jurisdiction. The court decided that the rule of *Imbler v. Pachtman*, 424 U.S. 409, which held that a state prosecutor acting within the scope of his duties in initiating and pursuing a criminal prosecution and presenting the state's case is absolutely immune to a suit for damages for alleged deprivations of the accused's constitutional rights, did not apply to this case. Judge Will noted that *Imbler* left open the question of a prosecutor's liability for actions taken in an investigative or administrative capacity. Apparently not realizing that Phoenix's trial had actually commenced on October 20 and had been interrupted only because of plaintiff's absence, he stated:

> "We are not at all certain that a request for a bench warrant at a [November 4] status hearing prior to the commencement of trial is part of the 'judicial phase of the criminal process' and we are inclined to believe that it is simply a ministerial act within the prosecutor's administrative functions." (446 F.Supp. at 1162; footnote omitted.)

That may well be true, but the Phoenix trial had commenced and defendant's action in securing plaintiff's attendance as a witness was part of the trial process.

[4] Absolute immunity would protect the defendant from liability for any official act regardless of whether the wrongdoing was intentional or even malicious, whereas qualified immunity would afford protection only for official actions taken in good faith. Since the plaintiff here alleges intentional deprivation of his rights and the only question presented at this stage of the proceedings is the correctness of the district court's denial of the Government's motion to dismiss, there was no opportunity to test Kieser's "good faith belief that Mr. Daniels was attempting to evade service" (March 24, 1978, Tr. 12).

Therefore, the first underpinning of the ruling below cannot stand.[5]

The district judge also thought that absolute prosecutorial immunity should not apply when the plaintiff is not an allegedly wronged criminal defendant but is a witness for the prosecution, stating:

> "While there may be merit in the concern that a prosecutor will be hesitant to bring an action against a defendant for fear of being subject to civil liability, there seems to us to be little ground for believing that a prosecutor will choose his witnesses differently because of the same fear. Nor does the common law origin of prosecutorial immunity, stemming from the question of amenability to suit for malicious prosecution, have any application when the civil plaintiff is a witness rather than a defendant." (446 F.Supp. at 1163.)

As will be seen, this second underpinning of the district court's rationale has been rejected by the Supreme Court, leaving no foundation for the district court's well-meaning decision.

The district court concluded that defendant had available to him only the good faith defense attendant on the qualified immunity available to public officials. Pursuant to 28 U.S.C. § 1292(b), Judge Will certified as

[5] We do not mean to imply that a prosecutor has absolute immunity for anything he does once the trial has begun. As will be developed *infra*, the prosecutor's immunity is absolute only when he is performing "quasi-judicial" functions. When he is acting in an administrative or investigative capacity, his immunity may be only qualified. We agree with Judge McGowan, writing for the majority in *Briggs v. Goodwin*, 569 F.2d 10, 23 (D.C. Cir. 1977), certiorari denied, ... U.S. ....., that

> "[T]he investigative function may embrace some acts even when performed after the commencement of judicial proceedings. Attention must be focused on the behavior itself, and not solely on its timing."

However, in making the often difficult decision as to what behavior is investigative or administrative and what is quasi-judicial, whether or not the trial has commenced may be relevant. We think it is in this case.

appropriate for immediate appeal the question whether in the circumstances presented the prosecutor enjoyed absolute or only qualified immunity. On May 10, 1978, we granted defendant's application for an interlocutory appeal. We reverse.

The latest authoritative pronouncement on the subject of prosecutorial immunity is found in *Butz v. Economou*, ... U.S. ....., 46 LW 4953, 4961, where the Supreme Court held that absolute prosecutorial immunity, rather than merely qualified official immunity, is extended to Executive Branch officials whose duties are prosecutorial in nature. In *Butz* the Court (unanimous in this respect) reaffirmed the holdings in *Yaselli v. Goff*, 275 U.S. 503, and *Imbler v. Pachtman*, 424 U.S. 409, that prosecutors have absolute immunity while "participating in the judicial process." The Court reasoned that a qualified immunity might have an adverse effect on the functioning of the criminal judicial system by discouraging the initiation of prosecutions and "by affecting the prosecutor's conduct of the trial." In *Butz*, the Court reiterated its observation in *Imbler* that

> "If prosecutors were hampered in exercising their judgment *as to the use of . . . witnesses* by concern about resulting personal liability, the triers of fact in criminal cases would often be denied relevant evidence." (424 U.S. at 426; emphasis supplied.)

As the *Butz* Court noted, in *Imbler* the Court specifically reserved the question whether absolute immunity is required "for those aspects of a prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate" (n. 37).

Applying *Butz* and *Imbler* to the present case requires us to reverse because defendant was not cast in the role of an administrator or investigative officer with respect to securing Daniels' attendance at Phoenix's trial. Here, as already noted, the October 20 trial had only been recessed so that the Government could obtain the presence of Daniels to testify about his ownership of the automobile and to produce the documents of title. As the defendant observes, since the trial had begun and

Daniels' testimony was an essential element of the Government's case, jeopardy had attached and the Government's failure to prove ownership and interstate transportation of the car through Daniels' testimony and his documentary evidence might have resulted in a directed verdict without the possibility of a retrial. In seeking to guarantee Daniels' presence at the trial through the material witness warrant, defendant was attempting to prove all elements charged in the indictment. Thus *Imbler* affords him absolute immunity since the activities of defendant "were intimately associated with the judicial phase of the criminal process * * *" (424 U.S. at 430).

To avoid *Imbler* and *Butz*, plaintiff relies heavily on *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), certiorari denied, ... U.S. ..... . However, that case involved the prosecutor's alleged perjury in a grand jury investigation before an indictment had been brought. This clearly was during the investigative stage of the proceedings and thus falls within one of the possible *Imbler* exceptions. Similarly in *Hampton v. City of Chicago*, 484 F.2d 602, 609 (7th Cir. 1973), certiorari denied, 415 U.S. 917, we denied absolute immunity to a State's Attorney and his assistant where no prosecution had commenced and they were investigators acting like police officers.[6]

With the single exception of *Hampton*, this Circuit has consistently upheld the quasi-judicial or absolute immunity of prosecutors where, as here, they were acting within the scope of their office. *Heidelberg v. Hammer*,

[6] The *Hampton* exception was recently applied in *J. D. Pflaumer Inc. v. United States Department of Justice*, 450 F.Supp. 1125 (E.D. Pa. 1978). There the prosecutor allegedly ordered certain documents seized without a warrant in violation of the plaintiff's Fourth Amendment rights and the court concluded that the prosecutor was acting in his investigative capacity, but in *Pflaumer* the alleged deprivation of constitutional rights occurred during a grand jury investigation before an indictment was even handed down. In contrast, trial had commenced in the present case and the procuring of the witness was an integral part of the Government's case.

577 F.2d 429 (7th Cir. 1978); *Grow v. Fisher*, 523 F.2d 875, 877 (7th Cir. 1975); *Tyler v. Witkowsky*, 511 F.2d 449 (7th Cir. 1975); *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), reversed in part on other grounds, 414 U.S. 488; *French v. Corrigan*, 432 F.2d 1211, 1214 (7th Cir. 1970), certiorari denied, 401 U.S. 915;[7] *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954). Indeed, in *Grow* we expressly refused to adopt the qualified immunity concept urged upon us here, observing that all the Circuits considering the question had adopted the absolute immunity rule. 523 F.2d at 877 n. 1.[8] We are not disposed to make an exception where the civil plaintiff is a witness rather than the accused, for *Imbler* and *Butz* have at least implied that prosecutorial immunity also applies to suits by witnesses as well as by accused,[9] by focusing on whether the acts complained of were within the scope of the prosecutorial function rather than on the identity of the plaintiff. As the defendant states here, "it would be strange public policy indeed which would take away the right to sue a prosecutor from one most likely to suffer prosecutorial abuse, the criminal defendant, while giving the same right to a class of persons [witnesses] less likely to suffer prosecutorial abuse" (reply br. 9).[10]

[7] In *French*, the prosecutors were accorded absolute immunity even though they were accused of having conspired with others against the plaintiff.

[8] The latest example seems to be *Perez v. Borchers*, ... F.2d ..... (5th Cir. No. 77-2051, decided February 2, 1978) (*per curiam*), certiorari denied, ... U.S. ..... .

[9] In its most recent incursion into the related subject of judicial immunity, the Supreme Court did not permit a non-accused party plaintiff to prevail. *Stump v. Sparkman*, ... U.S. ....., 46 LW 4253.

[10] The plaintiff draws an opposite conclusion from this statement, arguing that since witnesses are less likely to sue prosecutors than are defendants, the *Imbler* Court's policy concern that prosecutors not be inhibited in performing their duties does not apply to suits by witnesses. Whether witnesses are less likely to institute such suits should not be the touchstone, for their suits would also have an inhibiting effect.

Apart from this case, apparently only *Beaver v. Carey*, 426 F.Supp. 301 (N.D. Ill. 1977), deals with quasi-judicial immunity when the plaintiff in the civil action was a witness in the prior criminal action. In *Beaver* the plaintiffs objected, as here, to their arrest pursuant to a material witness warrant. Judge Robson held that the Louisiana public defenders who filed motions to secure the warrants and the Illinois prosecutor who presented them to the Illinois court were all acting within the scope of their official duties and were therefore fully immune. Although there are factual differences between the *Beaver* case and the present one, we agree with Judge Robson's implicit reasoning that plaintiffs who were prior witnesses are not to be treated differently on that account from those who were prior defendants.

Because defendant was attempting to secure Daniels' presence at the resumption of the trial, we must consider that he was functioning as an advocate rather than as an investigator or administrator. His conduct was of course subject to the supervision of the trial judge. If his conduct is as reprehensible as the plaintiff alleges, a criminal prosecution or disbarment might be available (see 424 U.S. at 431, n. 34), but he has absolute immunity in this suit for damages.[11] Despite our natural sympathy for the plaintiff's position (but see n. 4 *supra*) and the district court's desire to afford him a means of redress, there is simply no room for us to distinguish *Imbler* or *Butz*.

The order denying defendant's motion to dismiss is hereby reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] At the oral argument, plaintiff's counsel advised us that a complaint has been lodged against Kieser "high" in the Justice Department.

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